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FIRE INSURANCE COMPANY and GOLDEN EAGLE INSURANCE
CORPORATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHAW MORTGAGE
CORPORATION dba
PATIOSOURCE & THE NATURAL
TOUCH, a California Corporation

Plaintiffs,

v.

PEERLESS INSURANCE
COMPANY, a New Hampshire
Company; GOLDEN EAGLE
INSURANCE CORPORATION, a
California Corporation; LIBERTY
MUTUAL INSURANCE COMPANY,
a Massachusetts Company; and DOES
1 – 20, inclusive,

Defendants.

CASE NO.: 08 CB 0709 BTM AJB

SDSC Case No. 37-2007-00084451-CU-BC-
CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
LIBERTY MUTUAL INSURANCE
COMPANY’S MOTION TO DISMISS**

**[Per Chambers, oral argument unless
requested by the Court.]**

**DATE: 6-6-08
TIME: 11:00 a.m.
COURTROOM: 15**

Date Complaint Filed: 12/21/2007

1. INTRODUCTION

Plaintiff Shaw Mortgage Corporation (“SMC”) has improperly named Liberty Mutual Insurance Company (“LMIC”) as a defendant in this matter. SMC’s claims against LMIC are for Breach of Insurance Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Declaratory Relief are untenable as a matter of law and contra to existing California authority. LMIC is not the insurer who issued the policy to

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SMC, as is established by the policy which is attached to the First Amended Complaint (“FAC”). LMIC cannot be liable for any of the claims alleged in the FAC.

Thus, LMIC should be dismissed from this action.

2. STATEMENT OF FACTS

This action is based on SMC’s dispute with PEERLESS concerning insurance policy benefits arising from a fire loss that occurred at the insured’s business premises, located at 9050 Kenamar Drive, San Diego, California. On December 21, 2007, SMC filed its Complaint in the San Diego Superior Court. On February 28, 2008, SMC filed its FAC. (A true and correct copy of Shaw Mortgage Corporation’s First Amended Complaint is attached as Exhibit “1” to the Declaration Dale A. Amato.)

SMC’s FAC names PEERLESS, GOLDEN EAGLE¹ and LMIC as defendants. The claims against all defendants are for Breach of Insurance Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Declaratory Relief. (*See*, Exhibit 1.)

According to the FAC, and specifically the declarations page of the applicable policy, attached as Exhibit “A” thereto, the only insuring entity is PEERLESS. LMIC is not issue the insurance policy to SMC. (*See*, FAC, ¶¶1-6, 18-28; *see, also*, declarations page, Exhibit “A” thereto.)²

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¹ Since GOLDEN EAGLE is not diverse to SMC, PEERLESS has filed, contemporaneously with this motion, a Motion to Drop GOLDEN EAGLE as a sham defendant, pursuant to F.R.C.P. 21, which is set to be heard at the same time as this motion.

² Documents attached to the complaint and incorporated by reference are treated as part of the complaint. (*Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F2d 1422 (9th Cir. 1990).) “[W]hen a written instrument contradicts the allegations in a complaint to which it is attached, *the exhibit trumps the allegations.*” (*Thompson v. Illinois Dept. of Prof. Reg.*, 300 F3d 750 (7th Cir. 2002) [emphasis in original; internal citations omitted]; *United States ex rel. Riley v. St. Luke’s Episcopal Hospital*, 355 F3d 370 (5th Cir. 2004).)

3. LMIC IS NOT THE INSURER AND THEREFORE, CANNOT BE SUED FOR BREACH OF CONTRACT, BAD FAITH OR DECLARATORY RELIEF.

It is settled California law that breach of contract and bad faith actions lie only against the insurer on this risk as a party to the insurance contract. (*Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566 (1973); *Tran v. Farmers Group, Inc.*, 104 Cal.App.4th 1202 (2002); *Seretti v. Superior Nat'l Ins. Co.*, 71 Cal.App.4th 920 (1999); *Austero v. National Cas. Co.* (1976) 62 Cal. App. 3d 511; *Waller v. Truck Insurance Exchange*, 11 Cal.4th 1 (1995); *Old Republic Insurance Company v. FSR Brokerage, Inc.*, 80 Cal.App.4th 666 (2000).) This is because privity of contract is required between insured and insurer.

Since LMIC is not the insurer, but PEERLESS is, LMIC must be dismissed from this litigation as the plaintiff cannot maintain any claims against LMIC.

4. CONCLUSION

Based on the foregoing, LMIC is an improper defendant and should be dismissed from the action.

DATED: April 18, 2008

By: S/Dale A. Amato
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